

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

In re:	§	
	§	
C&D WAREHOUSE, INC.,	§	Case No. 04-30753-H3-11
	§	Chapter 11
Debtor.	§	

**OBJECTION TO CONFIRMATION OF AMENDED CHAPTER 11 PLAN**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW the Official Unsecured Creditors Committee (the “Committee”) appointed in this Chapter 11 case, and hereby files its Objection to Confirmation of the Amended Chapter 11 Plan filed on May 25, 2004 at Docket Entry #123 (the “Plan”), and in support thereof would respectfully show the Court as follows:

**I. INTRODUCTION**

1. The Debtor filed a petition for relief under Chapter 11 on January 9, 2004.
2. On January 30, 2004, the U.S. Trustee’s office filed a notice appointing a reconstituted Committee. According to the claims docket, the Committee represents creditors holding approximate \$7 million in claims.
3. On March 3, 2004, the Court entered an order authorizing the sale of substantially all of the Debtor’s assets, except for cash and accounts receivable.
4. Since March, the Debtor has collected a total of approximately \$800,000 in cash.
5. The Plan provides for the appointment of a Plan Agent essentially to collect all remaining assets, object to claims, pursue avoidance actions, and make distributions.
6. The Plan Agent has sole authority to take the steps necessary to close out the case without supervision of either the court or the creditors.

7. During negotiations between the Debtor and the Committee, the Committee requested the Debtor to include a provision authorizing the formation of a post confirmation committee to supervise the Plan Agent in conducting his duties.

8. The Debtor has steadfastly refused to include a provision which permits the creditors some input into how their money is distributed. Consequently, the Committee does not support confirmation of the Plan. Moreover, absent a post-confirmation plan committee, the Committee does not support the appointment of Miles Harper as the Plan Agent since he is given sole and exclusive authority to proceed without the need for any court or creditor supervision.

## **II. Plan Violates Section 1129(a)(1)**

9. §1129(a)(1) provides that the Plan must comply with the provisions of Title 11. The plan fails to so comply in two ways.

10. First, §§ 1122 and 1123 require that the Debtor properly classify claims and designate classes as either impaired or unimpaired.

11. In Section 2.4 of the Plan, the Debtor has designated Class 5 as a convenience class. Convenience classes are permitted by §1122(b). According to Section 4.5 of the Plan, the convenience class is to be paid in full. Notwithstanding payment in full, the Debtor has incorrectly designated Class 5 as impaired. This designation required by §1123(a)(3) is incorrect. Therefore, the Plan does not comply with §1123(a)(3). Moreover, it appears that the Debtor has intentionally made this designation in an attempt to satisfy the requirement of §1129(a)(1) that an impaired class accept the plan. It is improper to attempt to use a convenience class which is to be paid in full to satisfy this requirement. *See generally In re Greystone Joint Venture*, 995 F.2d 1274 (5<sup>th</sup> Cir. 1991).

12. The second way the Plan violates §1129(a)(1) is that as a practical matter it provides for a discharge even though this is a liquidating plan. Section 13.2 of the Plan correctly states that

§1141(d)(3) prohibits discharges with respect to liquidating plans. Notwithstanding this acknowledgment, the second paragraph of Section 13.2 states,

The rights afforded in the Plan and the treatment of all Creditors therein will be in exchange for and in complete satisfaction and release of all Claims of any nature whatsoever. . . .

This language is tantamount to a prohibited discharge.

### **III. Plan Violates §1129(a)(8)**

13. §1129(a)(8) requires that all impaired classes accept the plan. The deadline for confirmation objections is July 6 and the deadline for voting is July 10. Therefore, the Committee has no way of knowing if this requirement is satisfied. However, since the Committee members will likely vote against the plan, this requirement will probably not be met.

### **IV. Plan Violates §1129(a)(10)**

14. §1129(a)(10) requires that at least one impaired class accept the plan without taking into account insiders. As stated above, the Debtor cannot use Class 5 to satisfy this requirement. Consequently, in view of the likelihood that the non-insider creditors will vote against the Plan, this provision will probably not be met.

### **V. The Plan Cannot be Crammed Down under §1129(b)**

15. §Section 1129(b) is only available if the Debtor meets all of the §1129(a) requirements except for subparagraph (8). Thus, as stated above, if the Debtor cannot meet the requirements of §1129(a)(10) cram down is not available.

16. Moreover, the plan is not fair and equitable as required by §1129(b). The phrase “fair and equitable” does not simply mean compliance with the absolute priority rule. Rather, it means that the plan must be fair to the dissenting creditors. *See In re Spanish Lake Associates*, 92 B.R. 875, 878 (Bankr. E.D. Mo. 1988) cited favorably by the Fifth Circuit Court of Appeals in *In re D&F*

Construction, Inc., 865 F.2d 673 (5<sup>th</sup> Cir. 1989). As stated above, the plan proposes to give carte blanche unsupervised authority to a Plan Agent over funds that belong to the creditors. Over the creditors' objection, it is simply unfair to confirm a plan which prohibits the creditors and the Court from having input concerning the distribution of creditor money.

WHEREFORE, the Committee prays that:

1. The Court deny confirmation of the Plan.
2. The Court authorize the Debtor to modify the Plan to provide for a post-confirmation plan committee.
3. The Court grant such other and further relief as is just and proper.

Respectfully submitted,

WEYCER, KAPLAN, PULASKI & ZUBER, P.C.

By: /s/ Edward L. Rothberg

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CREDITORS COMMITTEE

**Master Service List  
C&D Warehouse, Inc.**

C & D Warehouse, Inc.  
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Preston T. Towber  
Goforth Lewis & Williams  
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Ellen M. Hickman  
Office of the U.S. Trustee  
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Houston, TX 77002

**Secured Creditors:**

Capital Bank  
10304 - I-10 East  
Houston, TX 77029

G E Capital  
P O Box 31001  
Pasadena, CA 91110-7421

**Taxing Authorities:**

Internal Revenue Service  
Special Procedures Staff - Insolvency  
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Houston ISD  
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Houston, TX 77210-4668

Harris County Tax Assessor  
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Houston, TX 77210-4089

North Forest ISD  
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Houston, TX 77228-3278

**Creditors Committee:**

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Houston, TX 77008

American National Insurance Co.  
Attn: Frederick Black  
One Moody Plaza  
Galveston, TX 77550

MAK Transport, Inc.  
Attn: Thomas H. Yelverston, President  
7900 Lyons Avenue  
Houston, TX 77029

Wooden Pallets, Ltd.  
Attn: David Weaver  
P O Box 555  
Silsbee, TX 77656

First Industrial L.P.  
Attn: Al Gabosch  
8850 Jameel, Suite 100  
Houston, TX 77040

Port Terminal Railroad Association  
Attn: Ernest Svec  
8934 Manchester  
Houston, TX 77012

**20 Largest Unsecured Creditors:**

Acme Skid & Plug  
P.O. Box 187  
Silsbee, Texas 77656

Anico Warehouse Trust  
P.O. Box 924133  
Houston, Texas 77292-4133

Ferrellgas  
99 Holmes Road  
Houston, TX 77045

Four Star Transportation Inc.  
P.O. Box 24915  
Houston, Texas 77229

G & A Pallet Co.  
Claico Financial Group  
P.O. Box 30558  
Houston, Texas 77249-0558

Greenbriar Holdings Houston LTD  
c/o Chase Bank N A  
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IBS-Industrial  
P.O. Box 427  
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International Chem-Metals (USA) Inc.  
P.O. Box 1295  
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International Paper  
P.O. Box 676565  
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Pacesetter Personnel Service  
P.O. Box 2146  
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Perry Scale Co.  
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Stewart & Stevenson  
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